IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No. 1631 of 1990

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GULAM MOHYUDDIN SHAIKH - Appellant(s)
Versus
MUNIRUDDIN GULAM MOHYUDDIN SAIYED - Defendant(s)

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Appearance :
MR ARUN H MEHTA for Appellant
MR NS DESAI for Respondent

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 14/06/2006

CAV JUDGEMENT

1.0 This appeal is directed against the judgement and decree dated 31st August 1990 passed by the City Civil Court, Ahmedabad in Civil Suit No.105 of 1984, whereby the respondents herein were permanently restrained from taking away forceful possession of the suit property bearing City Survey No.4037, situated at Badshah's Hajira, Manekshowk, Jamalpur Ward No.2, Ahmedabad.

2.0 The short facts of the case as emerging from the record are as under:

2.1 The property bearing survey number 4037 situated in Badshah's Hajira, Manekchowk, Mamalpur Ward No.2 (hereinafter referred to as the said property) is the ownership of one Kutbuddin Abdul Kadar who is residing at Mumbai. One Bavamiya Kadri was managing the affairs of the said property. The said suit property was let out to the plaintiff at a monthly rent of Rs.50/- from 1.12.1983. The said property has been used for the purpose of storing scraps and old luggage. On the western side of the suit property there is a property bearing Survey No.4038 which is of the ownership of the present appellant-original defendant. According to the respondent-plaintiff, he has paid rent regularly. The respondent plaintiff alleged that the appellant-defendant is trying to take forceful possession of the tenanted property. Therefore the respondent-plaintiff has filed the aforesaid civil suit before the City Civil Court praying for permanent injunction restraining the appellant-defendant from taking away the forceful possession of the suit premises. The City Civil Court after hearing the parties passed the aforesaid judgement and decree which is challenged in the present petition.

3.0 Learned Advocate for the appellant submitted that the trial court

has committed an error in relying upon the affidavits of Ahmedhussein Mohmadhussein and Gulamhussein Muhmadhussein whose affidavits were produced with the affidavit of the Pliantiff at Exh.22 filed in Notice of Motion when the said two persons were not examined as witnesses in the trial of the suit. He submitted that it was not even alleged much less proved that they were dead or that they cannot be found or that their attendance cannot be procured without any delay or expenses. Mr. Mehta further submitted that it is settled principle of law that the plaintiff must prove his case and cannot be allowed to take advantage of the weakness of the case of the defendant.

3.1 According to Mr. Mehta, the alleged owner of the property one Kutubuddin Abdulkadar Kadri, who was residing at Mumbai, has died and the alleged lease by Bavamiya Kadri cannot create any tenancy rights in favour of the plaintiff-respondent. He submitted that the trial court has failed to appreciate that even according to the report of the Commissioner, the suit property could not be opened with the key given to him by the plaintiff, but it could be opened only with the key given by the defendant appellant which showed that the possession of the suit property was that of the defendant-appellant. He further submitted that the Commissioner's report shows that the appellant-defendant was in possession and not the respondent-plaintiff. According to him the respondent-plaintiff has failed to prove his possession and therefore the suit which was for injunction only should have been dismissed. In view of the above, Mr. Mehta submitted that this appeal requires to be allowed.

4.0 On behalf of the respondent Mr.N.S. Desai, learned Advocate submitted that the suit property belongs to Kutbuddin Abdulkadar Kadrai

who was residing at Mumbai and the said property is managed by one Bavamiya Kadri. The plaintiff has kept the property on lease at a monthly rent of Rs.50/- from Bavamiya Kadri and the property was used for the purpose of storing scraps and old luggages. He submitted that the scrap and luggage lying in the suit property were of the ownership of the respondent-plaintiff. He further submitted that the respondent-plaintiff has proved his case by producing certified copy of property card of the suit property at Exh.32 and he has also produced copy of tracing of the suit property at Exh.33.

4.1 Mr. Desai further submitted that the plaintiff respondent has produced two rent receipts at Exh.34 and 35 in order to show that the plaintiff has paid rent on two occasions to Bavamiya Kadri, manager of the suit property. He submitted that his evidence in his deposition was supported by his witness Bavamiya Kadri and witness Amiruddin Saiyed at Exh.40.

4.2 Mr. Desai submitted that the lock which is applied to the property has been changed by the brother of the appellant-defendant. He, therefore, submitted that so far as the judgment given by the trial court is concerned, it does not suffer from any infirmities or any misappreciation of evidence and therefore this appeal is required to be dismissed.

5.0 The case of the appellant is that originally the property in question was of the ownership of one Kamaluddin Nannumiya. The said premises being a Kachha premises fell down and the scrap and other articles lying therein were taken away by Kamaluddin Nannumiya and the premises remained open. The appellant and his brother constructed

a well in front of their houses which were of their ownership situated on the eastern and western side of the suit premises and covered the suit premises. Since then they had been using the suit premises without interruption from any person. Thus, they were in possession of the premises since 1936-37 by way of adverse possession as owners. At the relevant time the possession of the suit premises was that of Abdul Rahman Ahmedmiya Shaikh on behalf of the appellant as well as on behalf of the brothers of the appellant. Ahmedmiya, son of late Kamaluddin died in the year 1971 and since 1971 to 1978 no legal heirs of Ahmedmiya have come forward.

5.1 In the year 1979 Bayamiya Kutubuddin Kadri without the knowledge and consent of the appellant mutated the entry in the city survey record in the name of alleged nephew. The case of the appellant is that the property of the appellant and his brothers is adjacent to the suit property and therefore he was in possession of the said property. There is an allegation that the respondent-plaintiff tried to take forceful possession of the suit property as a result which there was altercation and fighting and the appellant and his two brothers had suffered injuries. Criminal complaint was filed and the respondent-plaintiff was arrested and later on released on bail. Therefore the respondent alleged that the respondent was trying to take possession of the property and therefore the suit in question has been filed.

6.0 As a result of hearing and perusal of the record, certain facts are undisputed. The trial Court had appointed a Commissioner and the commissioner had filed a report. In his report the Commissioner stated that the suit property could not be opened with the key given to him by

the plaintiff, but with the help of the key given to him by the defendant i.e. the appellant the lock of the suit property was opened and the inventory work was carried out. From this fact it is clear that the appellant was having the key to the premises and the respondent-plaintiff was not having the key in respect of the premises.

6.1 He further noted that the plaintiff as well as the defendant had claimed ownership of the articles lying in the suit property. However, the trial court has dealt with the Commissioner's report in a casual manner on the ground that Commissioner's report is not the sole criteria for deciding the suit.

6.2 According to the deposition of Bavamiya Kutbuddin, he has given the property to the respondent-plaintiff at a monthly rent of Rs.50/- and he has admitted the signatures on the rent receipts at Exh.34 and 35. However, he admitted that the date written in Exh.35 is in the hand writing of the Advocate. Therefore there is a doubt about this document. His admission would clearly point to the fact that the rent receipts are not genuine and therefore no reliance can be placed on the same.

6.3 The trial court has discussed about the two affidavits of Ahmedabad Ahmedhussein Mohmadhussein and Gulamhussein Muhmadhussein. Those affidavits were believed by the trial court without proving the same on the ratio laid down in Meghjibhai Khimjibhai Vs. Chaturbhai Taljabhai, reported in 19 GLR 216 to the effect that a statement made on oath not contested in cross-examination can be accepted without demur." The aforesaid two deponents were not examined as witnesses in the trial of the suit and it was not even alleged

or proved that they were dead or they cannot be found or their attendance cannot be procured without any delay or expense. These affidavits do not fall within the scope of any of the clauses of Section 32 of the Evidence Act. Section 32 of the Evidence Act is an exception to the rule that a person who desires to give evidence in a suit must be examined in chief, cross-examined and re-examined if necessary and when he is being so examined his previous statement can be used to contradict him, etc. as contemplated by section 145 of the Evidence Act. In the case of Meghjibhai (supra) the witnesses were examined in Court on oath, stated certain facts on oath and were not cross examined on these facts. It is in this context and facts that the Court has made the observations quoted by the Trial Court. Therefore, the trial court ought not to have relied upon those affidavits. Even otherwise it is a settled principle of law that the plaintiff must prove his case and cannot be allowed to take advantage of the weakness of the case of the defendant.

6.4 It is also required to be noted that the two affidavits do not show as to which part of the averments are true to knowledge and which avermetns are true to information. Therefore it cannot be said that those affidavit constitute any evidence. This is supported by the ratio laid down in the case of A.K.K. Nambiar V. Union of India, reported in 1970 SC 652 and Competent Authority Vs. Dhamji Virendra, reported in AIR 1997 Gujarat 106.

6.5 An allegation is made that the owner of the suit property gave power of attorney to one Bawamiya Kadri who gave lease of the same to the respondent-plaintiff and put him in possession. It is alleged that it

is to protect the said possession that the suit has been filed praying only for injunction. However, the copy of power of attorney nor any written authorization of the owner empowering Bawamiya is produced though both the respondent-plaintiff and Bawamiya refer to the same. Bawamiya stated that the document is with his lawyer, but no effort has been made to call the lawyer or to produce the same. Therefore, the respondent-plaintiff has failed to produce the same which would go to show that it was not in his possession. In fact the owner is not examined. Under these circumstances, in absence of any documentary proof the version of Bawamiya cannot be believed.

7.0 In substance, to prove possession the plaintiff relies on his evidence and of Bawamiya and of Amiruddin Saiyad, the alleged rent receipts Exhs. 34 and 35. As stated above, evidence of Bawamiya cannot be believed and even the rent receipts were not proved to be true documents. Apart from that the premises could not be opened with the keys of the respondent-plaintiff and the same was opened with the keys of the appellant-defendant.

8.0 It is also required to be noted that the suit was filed by the respondent-plaintiff on 9.1.1984, but he did not choose to file an application for appointment of Commissioner to prove his possession. On 23.1.1984 the appellant-defendant applied for appointment of Commissioner which was granted. Even when the Commissioner filed his report, no objections were filed and there was no allegation about change lock even though the premises could not be opened with the keys of the respondent-plaintiff. It is only in the examination in chief he has stated about the change of lock, which is only an after thought. Even the witness Amruddin Saiyed does not state that he informed the

respondent-plaintiff about the change of lock.

9.0 In sum and substance the Commissioner's report should have been accepted to show that at the date of the suit, the appellant-defendant was in possession and not the respondent-plaintiff and that the respondent-plaintiff having failed to prove his possession, the suit which is for injunction only should have been dismissed. From the totality of the evidence on record it is found that the respondent-plaintiff has failed to prove that he was in possession of the suit property. It is required to be noted that no evidence is led either by filing cross objections or otherwise about the truthfulness or otherwise of the Commissioner's report.

9.1 In fact the report is admitted to be correct when it states that the lock was opened with the keys of the appellant-defendant and could not be opened with the keys of the plaintiff. Even the rent receipts were proved to be not genuine as it having the writing by the Advocate. Therefore the rent receipts would not prove the case of the respondent-plaintiff.

10.0 Another aspect of the matter is that the respondent-plaintiff has filed the suit alleging that he was in possession as a tenant and he should not be dispossessed by force. In that case it was for the plaintiff to prove his possession at the date of the suit. Defendant need not prove his title to the property and it is also important to note that event he alleged legal owner is not a party to the suit.

11.0 In view of the aforesaid clear evidence, I am of the view that the trial court has fell into error in accepting the case of the respondent-

plaintiff. There are contrary evidence and when the respondent-plaintiff has failed to prove his possession of the suit property, the trial court ought not to have granted the injunction. Therefore, this appeal is required to be allowed. Accordingly this appeal is allowed. The judgement and decree dated 21st August 1990 passed by City Civil Court, Ahmedabad in Civil Suit No.105 of 1984 is quashed and set aside. No order as to costs.

[K.S. JHAVERI, J.]

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